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Relief from Prejudicial Joinder in Federal Criminal Cases (Part II)

Lester B. Orfield

RELIEF FROM PREJUDICIAL JOINDER IN FEDERAL CRIMINAL CASES (PART II.)

*Lester B. Orfield**

III. RULE 14 AS INTERPRETED IN THE DECISIONS

A. *Duplicity*

1. *Motion to dismiss*

Duplicity may be objected to by motion to dismiss under Rule 12(b).[313] If objection that a count is duplicitous is not raised prior to or during the trial, it is waived under Rule 12(b).[314] In one case it appeared that the defendant made his motion to dismiss for duplicity before his plea of not guilty.[315] Dismissal has been granted for duplicity followed by a *nolle prosequi* of the whole indictment, but the court pointed out that another prosecution was not barred.[316] Alleging several ways of committing a crime in a single count was often held not to be available as duplicity before the adoption of the Federal Rules of Criminal Procedure, and a court of appeal has pointed out that under Rule 7(c) it should not be open to attacks under the rules.[317] Rule 7(c) provides: "It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specific means."

2. *Motion to elect*

Prior to the Federal Criminal Rules there had been several cases of motions to compel the government to elect for duplicity. Since the rules there have been no motions to elect under Rule 14; however, there seems to be no good reason for not proceeding under Rule 14 by way of motion to elect.

3. *Motion for judgment of acquittal*

Duplicity may not be attacked by a motion for judgment of acquittal.[318]

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* A.B., M.A., LL.B., S.J.D.; Professor of Law, Indiana University.

This is the second of two installments. For the First installment see 36 NOTRE DAME LAWYER 276 (1961).

313 Brown v. United States, 228 F.2d 286, 287 (5th Cir. 1955); Owens v. United States, 221 F.2d 351, 353 (5th Cir. 1955); Torres Martinez v. United States, 220 F.2d 740, 743 (1st Cir. 1955); United States v. Hood, 200 F.2d 639 (5th Cir.), *cert. denied,* 345 U.S. 941 (1953); Braswell v. United States, 200 F.2d 597, 599 (5th Cir. 1952); Gray v. United States, 174 F.2d 919, 923 (8th Cir. 1949); Shockley v. United States, 166 F.2d 704, 709 (9th Cir. 1948); United States v. Bachman, 164 F. Supp. 898, 900 (D.D.C. 1958); United States v. Raff, 161 F. Supp. 276, 281 (M.D. Pa. 1958); United States v. Bailes, 120 F. Supp. 614, 617 (S.D. W.Va. 1954); United States v. Emspak, 95 F. Supp. 1012, 1014 (D.D.C. 1951); United States v. Brothman, 93 F. Supp. 924, 926 (S.D.N.Y. 1950); United States v. Coplon, 88 F. Supp. 912, 913 (S.D.N.Y. 1949); United States v. Greater Kansas City Retail Cond. Ass'n, 85 F. Supp. 503, 510 (W.D. Mo. 1949); United States v. Chandler, 74 F. Supp. 230, 236 (D. Mass. 1947).

314 Witt v. United States, 196 F.2d 285, 286 (9th Cir.), *cert. denied,* 344 U.S. 827 (1952). The court of appeals concluded that there was no duplicity. See also United States v. Richie, 222 F.2d 436, 437 (3d Cir. 1955); Torres Martinez v. United States, 220 F.2d 740, 743 (1st Cir. 1955); United States v. Lembo, 184 F.2d 411 (3d Cir. 1950); Beauchamp v. United States, 154 F.2d 413, 415 (6th Cir.), *cert. denied,* 329 U.S. 723 (1946).

315 Gray v. United States, 174 F.2d 919, 921 (8th Cir. 1949).

316 United States v. Potishman, 230 F.2d 271, 274 (5th Cir. 1956).

317 Korholz v. United States, 269 F.2d 897, 900 (10th Cir. 1959).

318 Flying Eagle Publications, Inc. v. United States, 273 F.2d 799, 803 (1st Cir. 1960).

4. *Motion in arrest of judgment*

Duplicity has been successfully attacked by motion in arrest of judgment,[319] but the motion has been denied, the court finding no duplicity present.[320] There is a doctrine of cure by verdict,[321] but, in one case, a district court stated, although generally an objection to duplicity must be made before trial or by motion in arrest of judgment, this is not true where the duplicity is more than technical, if the crimes charged entail different punishments. A general verdict in that case did not reveal of which crime the jury convicted the defendant. It would have been prejudicial to sentence the defendant for the greater penalty; hence the trial court sentenced the defendant for a lesser penalty, and denied the motion in arrest of judgment.[322]

5. *Appeal*

In one case a court of appeals considered the objection of duplicity on appeal, although it was not raised below.[323] A dissenting judge adopted the more usual view that duplicity should be raised by a motion to dismiss under Rule 12(b) and, if not so raised, it is waived.[324] In two cases the appellate court has considered the issue and found no duplicity.[325] The government may appeal from a ruling of the trial court dismissing a count of an indictment as duplicitous.[326] The appeal is to the court of appeals.

B. *Misjoinder of Offenses*

Rule 14 "is merely a restatement of existing law under which severance and other similar relief is entirely in the discretion of the court."[327] It seems clear that the rule applies where there is misjoinder under Rule 8 or improper consolidation under Rule 13. It should be available where there is duplicity. There is doubtless some overlapping with Rule 12 on motion to dismiss.

1. *Motion to dismiss*

Improper joinder of offenses is sometimes objected to by a motion to dismiss under Rule 12.[328] The motion to dismiss "is in effect a criticism or chal-

319 United States v. Martinez Gonzales, 89 F. Supp. 62, 63 (S.D. Cal. 1950).

320 United States v. Selage, 175 F. Supp. 439, 440, 442 (D.S.D. 1959). The defendant moved for dismissal prior to trial.

321 United States v. Poppa, 190 F.2d 112, 114 (7th Cir. 1951).

322 United States v. Shackelford, 180 F. Supp. 857, 860 (S.D.N.Y. 1957) The court concluded that a jury cannot find a defendant guilty as to one of the offenses charged in the duplicitous count and not guilty as to the other offenses charged in the same count.

323 United States v. Lembo, 184 F.2d 411 (3d Cir. 1950). The defendant did not complain even on appeal.

324 *Id.* at 415. See also Flying Eagle Publications, Inc. v. United States, 273 F.2d 799, 803 (1st Cir. 1960).

325 Hanf v. United States, 235 F.2d 710, 714 (8th Cir. 1956), *cert. denied,* 352 U.S. 880 (1956); Witt v. United States, 196 F.2d 285, 286 (9th Cir.), *cert. denied,* 344 U.S. 827 (1952).

326 United States v. Hood, 200 F.2d 639 (5th Cir. 1953). The government obtained a reversal.

327 Ross v. United States, 197 F.2d 660, 664 (6th Cir. 1952). The court cited Pierce v. United States, 160 U.S. 355 (1896); and Pointer v. United States, 151 U.S. 396 (1894). See also Ingram v. United States, 272 F.2d 567, 568 (4th Cir. 1959); Robinson v. United States, 210 F.2d 29, 32 (D.C. Cir. 1954).

328 Kivette v. United States, 230 F.2d 749, 751 (5th Cir. 1956); United States v. Spector, 99 F. Supp. 778, 783 (S.D. Cal. 1951).

lenge to the indictment."[329] One case held that an attack before trial for misjoinder of offenses and defendants "went to the validity of the indictment, not to the question of advisability of separate trials."[330]

Improper joinder of offenses should be objected to before trial.[331] If there is no such objection, there is a waiver under Rule 12(b).[332] But a considerable number of cases assert that dismissal is not the correct solution, but rather the relief provided for in Rule 14, that is to say, election or separate trial.[333] Even before the rules there was an increasing trend to hold against quashing or dismissing the indictment.

2. *Motion to compel election*

The granting of a motion to elect counts is in the sound discretion of the trial court. In several cases election has not been required,[334] but it is not ground for election that some defendants are not charged on all counts.[335] In those cases the counts were closely related to each other; the jury was instructed not to consider the testimony as to the other counts. Where a defendant, who at his arraignment moved to require the government to elect on which of five offenses charged in the indictment it would proceed, but did not thereafter suggest by motion or otherwise that trial on five offenses would confound him in his defense (the charges were of the same general character), and the jury acquitted the defendant on three of the five counts, denial of the motion for election was held not to be an abuse of discretion.[336] The defendant should have renewed this motion to elect at the close of the government's evidence or at the close of his entire case. The court stated:

> [T]he fundamental principle underlying the practice of requiring the prosecution to choose between offenses or counts is the prevention of prejudice and embarrassment to the accused and if the charges are of the same general character and are manifestly joined in one indictment in good faith, the government should not be

329 United States v. Kidwell, 14 F.R.D. 399, 400 (W.D. Mo. 1953).
330 Monroe v. United States, 234 F.2d 49, 57 (D.C. Cir.), *cert. denied,* 352 U.S. 873 (1956).
331 *Ibid.*
332 Willis v. United States, 271 F.2d 477, 479 (D.C. Cir. 1959) (consolidation); Smith v. United States, 180 F.2d 775 (D.C. Cir. 1950). *But see* United States v. Bernett, 140 F. Supp. 373 (D. Md. 1955).
333 Kleven v. United States, 240 F.2d 270, 272 (8th Cir. 1957); Finnegan v. United States, 204 F.2d 105, 109 (8th Cir. 1953); United States v. Northeast Texas Chapter, 181 F.2d 30, 33 (5th Cir. 1950); United States v. Connelly, 129 F. Supp. 786, 791 (D. Minn. 1955); United States v. Manno, 118 F. Supp. 511, 514 (N.D. Ill. 1954).
334 United States v. Mack, 249 F.2d 321, 326 (7th Cir. 1957), *cert. denied,* 356 U.S. 920 (1958); Meredith v. United States, 238 F.2d 535, 543 (4th Cir. 1956); Warren v. United States, 222 F.2d 419 (D.C. Cir. 1955); United States v. Harris, 211 F.2d 656, 659 (7th Cir. 1954); Peckham v. United States, 210 F.2d 693, 697 (D.C. Cir. 1953); Finnegan v. United States, 204 F.2d 105, 109 (8th Cir.), *cert. denied,* 346 U.S. 821 (1953); Ross v. United States, 197 F.2d 660, 663 (6th Cir. 1952); United States v. Stromberg, 22 F.R.D. 513, 519 (S.D.N.Y. 1957); United States v. Daigle, 149 F. Supp. 409, 412 (D.D.C. 1957); United States v. Scoblick, 15 F.R.D. 183, 184 (M.D. Pa. 1954); United States v. Sherman, 84 F. Supp. 130, 131 (E.D.N.Y. 1947), *aff'd in part and rev'd in part,* 171 F.2d 619 (2d Cir. 1948).
335 Ross v. United States, 197 F.2d 660, 663 (6th Cir. 1952).
336 Finnegan v. United States, 204 F.2d 105, 109 (8th Cir.), *cert. denied,* 346 U.S. 821 (1953).

> required to elect upon which count or counts it will proceed to trial.[337]

Where the offenses are of the same or similar character, they do not require election before trial.[338] If thereafter prejudice developed, there would be material error, unless cured by election or other relief. There is no prejudice where the defendant is acquitted on one count and granted a new trial on the other. Election will not be required where the evidence under each count is short, separable, and distinct,[339] nor where only one offense is alleged, such as conspiracy.[340] In only a very few cases does it appear that election was ordered;[341] a recent case in denying election pointed out that there was no misjoinder and that no motion for severance had been made.[342]

Where an information uses several counts to state an offense in a variety of forms to avoid a variance, "the defendant may call upon the prosecutor to elect" or seek a bill of particulars.[343] But where the counts state two distinct offenses no election will be required.[344] In one case, where the government admitted on appeal that certain counts stated the same offense, the court of appeals held that the judgments under such counts must fall.[345] In another recent case the court stated broadly: "the prosecution, seldom if ever, is required to elect upon which of several counts charging the same offense in various ways it will stand."[346]

3. *Motion to sever*

Severance as to counts will not be granted merely on the ground that proof under one count may be stronger than proof under another count.[347] Similarly, neither will a motion to compel the government to elect nor a motion to dismiss be granted solely on that basis. Variations in the strength of proof do not inevitably create unfairness. Separate trials of counts is a matter of discretion where the counts relate to the same general class of matter.[348] Where the defendant is convicted on only one count out of five, this tends to show that discretion was not abused. While severance may be granted even where the

337 *Ibid.*
338 Peckham v. United States, 210 F.2d 693, 697 (D.C. Cir. 1953).
339 Maurer v. United States, 222 F.2d 414 (D.C. Cir. 1955).
340 United States v. Stromberg, 22 F.R.D. 513, 519 (S.D.N.Y. 1957).
341 United States v. Bucciferro, 274 F.2d 540, 541 (7th Cir. 1960). The government elected the second and third counts of three counts for possessing and uttering counterfeit money. The government did not nullify the election by introducing evidence as to the first count as all the crimes were closely connected together.
342 United States v. Senior, 274 F.2d 613, 615 (7th Cir. 1960). In this case the defendants moved to dismiss or in the alternative to compel the government to elect.
343 United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 225 (1952). In the trial court the defendant attacked by motion to dismiss. 102 F. Supp. 179, 182, 187 (W.D. Mo. 1952).
344 United States v. Kidwell, 14 F.R.D. 399, 400 (W.D. Mo. 1953).
345 Calvaresi v. United States, 216 F.2d 891, 904 (10th Cir. 1954).
346 United States v. Daigle, 149 F. Supp. 409, 412 (D.D.C. 1957), *aff'd,* 248 F.2d 608 (D.C. Cir. 1957), *cert. denied,* 355 U.S. 913 (1958).
347 United States v. Sherman, 84 F. Supp. 130, 131 (E.D.N.Y. 1947), *aff'd in part and rev'd in part,* 171 F.2d 619 (2d Cir. 1948). It is enough that there is sufficient evidence to take the various counts to the jury. Williams v. United States, 218 F.2d 276, 279 (4th Cir. 1954).
348 Durden v. United States, 181 F.2d 496 (5th Cir. 1950). See also United States v. Lassoff, 147 F. Supp. 944, 946 (E.D. Ky. 1957), where the court pointed out that the same evidence would be involved.

joinder is proper the moving party must show prejudice.[349] In one case the motion for severance of counts was made after the trial had commenced and the government had completed its preliminary statement of the case on voir dire;[350] severance was refused because there was no showing of prejudice. In but few instances has severance of counts been granted.[351]

4. *Withdrawal of count from jury*

The court may withdraw from the jury's consideration a count or counts as unsupported by the evidence.[352] This does not constitute a forbidden amendment of the indictment. For instance, two counts out of three were withdrawn from the jury in the trial of Congressman Powell in 1960 in New York City.

5. *Motion for new trial*

Where a defendant fails to request severance of counts, he cannot later move for new trial.[353]

6. *Appeal*

If a defendant fails to move for severance of counts in the trial court, the appellate court will not review,[354] although occasionally the court of appeals passes on the issue of joinder, even though it was not raised below, and finds the joinder proper.[355] The appellate court will not reverse a ruling of the trial court refusing to compel elections of counts or severance of counts unless it is affirmatively shown that the sound discretion of the trial court was abused.[356]

7. *Habeas corpus*

In a case involving guilty pleas the government contended that a violation of Rule 8(a) could not be raised by habeas corpus. But the court did not rule on the contention as it found that the joinder was proper.[357] In another case the court considered the question on motion to vacate, even though no objection was made before or at the trial; however the joinder was found to be proper.[358]

Habeas corpus has been used to attack the constitutionality of joinder of offenses. It has been held that charging a defendant with making unlawful sale of narcotic drugs in eleven counts stating eleven separate offenses in a single indictment, and trying him before one jury, does not amount to a denial of due process of law; hence habeas corpus does not lie.[359]

C. *Misjoinder of Defendants*

1. *Motion to dismiss under Rule 12*

In one case the defendant moved for dismissal of the indictment for mis-

349 United States v. Bonanno, 177 F. Supp. 106, 117 (S.D.N.Y. 1959).
350 United States v. Trilling, 156 F. Supp. 462, 466 (D.D.C. 1957).
351 See *e.g.*, United States v. Guterma, 179 F. Supp. 420, 431 (E.D.N.Y. 1959).
352 United States v. Segelman, 86 F. Supp. 114, 125 (W.D. Pa. 1949).
353 United States v. Segelman, 86 F. Supp. 114, 117 (W.D. Pa 1949).
354 United States v. Perl, 210 F.2d 457, 461 (2d Cir. 1954).
355 Monroe v. United States, 234 F.2d 49, 57 (D.C. Cir.), *cert. denied,* 352 U.S. 873 (1956).
356 Meredith v. United States, 238 F.2d 535, 543 (4th Cir. 1956).
357 Edwards v. Squier, 178 F.2d 758, 759 (9th Cir. 1949).
358 United States v. Bernett, 140 F. Supp. 373 (D. Md. 1955).
359 Brandenburg v. Steele, 177 F.2d 279, 280 (8th Cir. 1949).

joinder of defendants and offenses, and in the alternative for severance and separate trials.[360] Many cases assert that dismissal is not the correct relief for misjoinder of defendants but rather severance under Rule 14.[361] Furthermore, the possibility of prejudice from the joinder is cured by severance.[362]

2. *Motion to dismiss under Rule 48*

Numerous defendants who are to be tried together may, like a single defendant, secure a dismissal of the indictment for delay under Rule 48(b) of the Federal Rules of Criminal Procedure.[363]

3. *Motion for severance*

The government may move for a severance of defendants,[364] and, while the court will balance the interests of the parties where the defendant seeks a severance, it is questionable whether any balancing is necessary where the government seeks a severance.[365] It makes no difference that there will be some delay in trying the defendants who are severed; but the government must show some reason for the severance. The moving party's affidavit preferably should allege the reason, although the reasons may be shown otherwise. The government makes an adequate showing when it shows that the pattern of proof as to certain defendants is much simpler than that as to others, and that evidence regarding the defendants as to whom severance is sought cannot be available until after trial of the other defendants. The government is likely to move for a severance where some of the defendants become government witnesses.[366] The fact that it is held that a defendant who commits a crime jointly with others may be jointly or severally prosecuted in the discretion of the government[367] is of course clearly connected with the rule that the government may move for a severance.

The trial court may on its own motion order a severance of defendants,[368] and if it later appears that joinder was not prejudicial, it can consolidate the cases for a single trial. Even though joinder is proper under Rule 8, the trial court is not relieved from its duty of acting under Rule 14 *sua sponte*.[369]

But most commonly severance is granted on the motion of the defendant or defendants. By far the greatest number of cases under Rule 14 involve mo-

360 Heald v. United States, 177 F.2d 781, 782 (10th Cir. 1949).

361 United States v. Northeast Texas Chapter, 181 F.2d 30, 33 (5th Cir. 1950); Rakes v. United States, 169 F.2d 739, 743 (4th Cir.), *cert. denied,* 335 U.S. 826 (1948); United States v. Harvick, 153 F. Supp. 696, 697 (D.N.D. 1957); United States v. Connelly, 129 F. Supp. 786, 791 (D. Minn. 1955); United States v. Mann, 118 F. Supp. 511, 514 (N.D. Ill. 1954). *But see* Monroe v. United States, 234 F.2d 49, 57 (D.C. Cir.), *cert. denied,* 352 U.S. 873 (1956). In one case in upholding denial of a severance the court referred to both Rules 12 and 14. United States v. Soto, 256 F.2d 729, 735 (7th Cir. 1958).

362 Rakes v. United States, 169 F.2d 739, 743 (4th Cir.), *cert. denied,* 335 U.S. 826 (1948).

363 United States v. McWilliams, 163 F.2d 695, 696 (D.C. Cir. 1947).

364 United States v. Stromberg, 268 F.2d 256, 260 (2d Cir. 1959); United States v. Tomaiolo, 249 F.2d 683, 686 (2d Cir. 1957).

365 United States v. Dioguardi, 20 F.R.D. 10, 13 (S.D.N.Y. 1956).

366 United States v. Stromberg, 22 F.R.D. 513, 526 (S.D.N.Y. 1957).

367 United States v. Mimee, 89 F. Supp. 148, 150 (E.D. Mich. 1950). See also United States v. Dioguardi, 20 F.R.D. 10, 13 (S.D.N.Y. 1956).

368 United States v. Harvick, 153 F. Supp. 696, 698 (D.N.D. 1957). The defendants asked for a dismissal, but the court ordered a severance. The case is cited favorably in a dissenting opinion in Griffin v. United States, 272 F.2d 801, 804, 806 (5th Cir. 1959).

369 United States v. Guterma, 181 F. Supp. 195, 196 (E.D.N.Y. 1960).

tions by defendants for severance of defendants. It has been asserted that an application for a severance is "in effect an invocation of the right to a trial by an impartial jury guaranteed by the Sixth Amendment."[370] Yet the granting of separate trials to co-defendants is a matter of discretion.[371] The trial judge may therefore deny separate trials to three defendants charged with first degree murder even where the death sentence is imposed on two of them.[372] Severance is rarely granted in conspiracy cases because this would be impractical and expensive.[373] Severance as to conspiracy is not granted on a mere allegation of nonparticipation in the conspiracy;[374] nor is it granted because the defendant committed an overt act at some considerable time after the conspiracy began.[375] No severance need necessarily be granted as to criminal contempt when the defendants are closely connected,[376] nor as to perjury where it does not appear that the defendants must take positions contrary to each other.[377]

Sometimes defendants will move for both severance of defendants and severance of counts. In one case it was moved that there be a separate trial of all defendants under the first and second counts; a separate trial of defendant A under the third and fourth counts; a separate trial of defendant B under the fifth and sixth counts; a separate trial of defendant C under the seventh and eighth counts; and a separate trial of defendant D under the ninth and tenth counts.[378]

A defendant seeking a severance should make the motion for severance himself; he should not rely on a motion made by other defendants. If he does, he is in no position to object on appeal.[379] It is not a ground of severance that the defendant might have a better chance of acquittal if tried separately[380] or

370 United States v. Stein, 140 F. Supp. 761, 765 (S.D.N.Y. 1956).

371 Paoli v. United States, 352 U.S. 232, 243 (1957); Opper v. United States, 348 U.S. 84, 95 (1954); Maynard v. United States, 215 F.2d 336, 338 (D.C. Cir. 1954); Edwards v. United States, 206 F.2d 855, 856 (10th Cir. 1953). See cases cited at ANNOT., 54 A.L.R.2d 834 (1957).

372 Shockley v. United States, 166 F.2d 704, 709 (9th Cir. 1948). *Accord* as to first degree murder, see Stewart v. United States, 214 F.2d 879, 881 (D.C. Cir. 1954); Allen v. United States, 202 F.2d 329, 334 (D.C. Cir.), *cert. denied,* 344 U.S. 869 (1952); Hall v. United States, 168 F.2d 161, 163 (D.C. Cir.), *cert. denied,* 334 U.S. 853 (1948). *Accord* as to negligent homicide, see Simic v. United States, 86 A.2d 98, 102 (Munic. Ct. of App. D.C. 1952), *aff'd,* 198 F.2d 951 (D.C. Cir. 1952).

373 United States v. Postma, 242 F.2d 488, 493 (2d Cir. 1957); Duke v. United States, 233 F.2d 897, 900 (5th Cir. 1956); United States v. Gilboy, 160 F. Supp. 442, 457 (M.D. Pa. 1958); United States v. Maine Lobsterman's Ass'n, 160 F. Supp. 115, 120 (D. Me. 1957); United States v. Silverman, 129 F. Supp. 496, 500 (D. Conn. 1955); United States v. Mesarosh, 13 F.R.D. 180, 184 (W.D. Pa. 1952); United States v. Klock, 100 F. Supp. 230, 235 (N.D.N.Y. 1951).

374 United States v. Dioguardi, 20 F.R.D. 10, 14 (S.D.N.Y. 1956); United States v. Cohen, 113 F. Supp. 955, 958 (S.D.N.Y. 1953).

375 United States v. Malinsky, 19 F.R.D. 426, 429 (S.D.N.Y. 1956).

376 Bullock v. United States, 265 F.2d 683, 689 (6th Cir. 1959).

377 United States v. Bonanno, 177 F. Supp. 106, 118 (S.D.N.Y. 1959). Historically there could not be joinder of defendants as to perjury. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 263-64 (1947).

378 United States v. American Stevedores, 16 F.R.D. 164, 169 (S.D.N.Y. 1954). The motion was denied. See also Herald v. United States, 177 F.2d 781, 782 (10th Cir. 1949); United States v. Bonanno, 177 F. Supp. 106, 116 (S.D.N.Y. 1959); United States v. Bachman, 164 F. Supp. 898, 902 (D.D.C. 1958); United States v. Stromberg, 22 F.R.D. 513, 524 (S.D.N.Y. 1957).

379 Brown v. United States, 228 F.2d 286, 287 (5th Cir. 1955), *cert. denied,* 351 U.S. 986 (1956).

380 Robinson v. United States, 210 F.2d 29, 32 (D.C. Cir. 1954).

that severance is technically advantageous.[381] Where trial was by the court without a jury, the trial judge was not required to grant a separate trial to one of two defendants charged with violation of the White Slavery Act and conspiracy to violate the Act, in the absence of any showing of prejudice.[382]

A defendant seeking severance should make a showing that he would be prejudiced by reason of the joinder.[383] He might show confusion or undue complexity. A defendant complaining of statements signed by co-defendants should set out in his affidavit the contents of the statements;[384] if he claims that the defenses are antagonistic, he should allege this.[385] Where defendants ask for severance on the ground of inconsistent defenses, no severance will be granted if it is not pointed out wherein the inconsistency lies.[386] In a prosecution for conspiracy to violate the Smith Act, severance was not granted on the ground that the defense of one defendant would turn on freedom of speech and academic freedom, while the defenses of the other defendants turned on freedom of the press.[387]

A severance will not be granted because a co-defendant has fled before a former trial;[388] it makes no difference that an unfavorable inference might be drawn from such flight. Conversely the co-defendant who had fled was not entitled to a severance because he was being tried with defendants who had previously been tried and convicted, but their convictions had been set aside.

It is not a ground for severance that various co-defendants have already been convicted in a state court for the same conduct;[389] nor is it a ground for severance that all the other defendants had past criminal records;[390] nor that several co-defendants had already pleaded guilty to a separate indictment and that another co-defendant had a criminal record;[391] nor that one defendant had been closely connected with racketeers and had gotten unfavorable newspaper publicity when he was indicted.[392]

Severance of defendants will not be granted merely because there is no blanket allegation in the indictment that the defendants had participated in the same series of acts or transactions.[393] It is enough that the indictment reasonably construed so alleges. Rule 52(a) of the Federal Rules of Criminal Procedure makes this harmless error.

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381 United States v. Brennan, 134 F. Supp. 42, 52 (D. Minn. 1955).
382 Long v. United States, 160 F.2d 706, 710 (10th Cir. 1947). See also Edwards v. United States, 206 F.2d 855, 856-57 (10th Cir. 1953).
383 United States v. J. B. Watkins Co., 120 F. Supp. 154, 158 (D. Minn. 1954). See also United States v. American Stevedores, Inc., 16 F.R.D. 164, 169 (S.D.N.Y. 1954).
384 United States v. Echeles, 222 F.2d 144, 151 (7th Cir. 1955).
385 United States v. Echeles, 222 F.2d 144, 151 (7th Cir. 1955); Allen v. United States, 202 F.2d 329, 334 (D.C. Cir. 1952).
386 Allen v. United States, 202 F.2d 329, 334 (D.C. Cir.), *cert. denied,* 344 U.S. 869 (1952). In a conspiracy case the court denied severance for antagonistic defenses. United States v. Dioguardi, 20 F.R.D. 10, 13 (S.D.N.Y. 1956).
387 United States v. Fujimoto, 102 F. Supp. 890, 898 (D. Hawaii 1952).
388 United States v. Stein, 140 F. Supp. 761, 765 (S.D.N.Y. 1956).
389 United States v. Mesarosh, 13 F.R.D. 180, 185 (N.D. Pa. 1952).
390 United States v. Dioguardi, 20 F.R.D. 10, 14 (S.D.N.Y. 1956).
391 United States v. Stracuzza, 158 F. Supp. 522, 524 (S.D.N.Y. 1958).
392 United States v. Greater Blouse, etc., Contractor's Assn., 177 F. Supp. 213, 221 (S.D.N.Y. 1959).
393 United States v. Welsh, 15 F.R.D. 189, 190 (D.D.C. 1953).

Severance of defendants has occasionally been sought on the ground of illness of the defendant seeking severance.[394] But, where the moving party is improving in his physical condition, the court may reserve final determination of the question of severance;[395] a court will not rule on such a motion until the medical reports of the physicians examining him have been received.[396] A continuance or severance will be denied where the physician appointed by the court gives his opinion that trial can be safely had.[397]

Where several defendants are tried together, each has a right to testify at the trial; he need not obtain the consent of the co-defendant and may testify against him.[398] Such is the effect of the statute[399] providing that a federal criminal defendant shall at his own request, but not otherwise, be a competent witness. The trial judge may permit a co-defendant to reopen his case and take the witness stand after both sides have announced that all the evidence is in, even though the co-defendant's testimony tends to prove the defendant's guilt.[400] The court in this case noted that the co-defendant had not previously testified at the trial; his liberty was at stake, the court said, he should be allowed to testify.

Judicial and extra-judicial confessions by a co-conspirator after the termination of the conspiracy are not admissible as evidence against a non-declaring defendant.[401] But when joint defendants are on trial, implicating confessions are admissible if the jury is admonished that such confessions are evidence only against the declaring defendant.[402] The rule admitting confessions is based on the notion that juries do in fact heed judicial admonitions, and that the effect of the confession is therefore confined to the defendant who confesses.[403] Some decisions admit that the admonition may have but little value,[404] yet sustain the rule as assisting the judicial search for truth.[405] But it has been pointed out that such confessions are particularly untrustworthy and that juries are unable to follow the admonition.[406] Justice Rutledge, speaking for the Court, has pointed out:

394 United States v. Stein, 140 F. Supp. 761 (S.D.N.Y. 1956). Severance was granted, but later a continuance and severance were denied.

395 United States v. Foster, 81 F. Supp. 281, 284 (S.D.N.Y. 1948).

396 United States v. Mesarosh, 13 F.R.D. 180, 190 (W.D. Pa. 1952).

397 United States v. Stein, 140 F. Supp. 761, 765 (S.D.N.Y. 1956).

398 United States v. Haynes, 81 F. Supp. 63, 70 (W.D. Pa. 1948). *Accord,* Maupin v. United States, 225 F.2d 680, 682 (10th Cir. 1955); Rowan v. United States, 281 Fed. 137, 139 (5th Cir.), *cert. denied,* 260 U.S. 721 (1922).

399 62 Stat. 833 (1948), 18 U.S.C. § 3481 (1958).

400 Maupin v. United States, 225 F.2d 680, 682 (10th Cir. 1955). See also United States v. Haynes, 81 F. Supp. 63, 70 (W.D. Pa. 1948).

401 Krulewitch v. United States, 336 U.S. 440, 443 (1949), Fiswick v. United States, 329 U.S. 211, 217 (1946). See 72 HARV. L. REV. 920, 989 (1959); 56 COLUM. L. REV. 1112 (1956).

402 Costello v. United States, 255 F.2d 389, 395 (8th Cir. 1958); Corcoran v. United States, 229 F.2d 295, 298 (5th Cir. 1956); United States v. Leviton, 193 F.2d 848, 856 (2d Cir. 1951); United States v. Gottfried, 165 F.2d 360, 367 (2d Cir.), *cert. denied,* 333 U.S. 860 (1948).

403 Opper v. United States, 348 U.S. 84, 95 (1954).

404 Blumenthal v. United States, 332 U.S. 539, 559 (1947) *affirming,* 158 F.2d 883, 890 (9th Cir. 1946).

405 See United States v. Gottfried, 165 F.2d 360, 367 (2d Cir.), *cert. denied,* 333 U.S. 860 (1947).

406 See the dissenting opinion of Jerome Frank in United States v. Leviton, 193 F.2d 848, 857, 863 (2d Cir.), *cert. denied,* 343 U.S. 946 (1951).

> Perhaps even at the best the safeguards provided by clear rulings on admissibility, limitations on the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that these safeguards be made as impregnable as possible.[407]

In 1953 the Court held that the admission against all of the conspirators, though not present when it was made, of a single declaration made after the conspiracy had ended, was harmless error under Rule 52(a) of the Federal Rules of Criminal Procedure.[408] There were limiting instructions by the trial judge. The Court seemed to say that use of the declarations was not a violation of the hearsay rule, provided there were limiting instructions. Only in the absence of such instructions was the hearsay rule violated.

In *Paoli v. United States,*[409] where the defendant failed to move for a severance, the Court held that the admission in evidence of a confession is not per se prejudicial. It based its decision on the conclusion that, under the circumstances of the particular case, the jury was considered to have followed the instructions. But the case seems to imply that, in spite of an instruction to disregard the confessions as to other defendants, there may be factual situations in which its admission would be prejudicial. For example, there could be prejudicial error in a large conspiracy trial in which there are several confessions each admissible as to only one defendant.

There were numerous comments on this decision, most of them critical.[410] Admonitions to the jury cannot completely cure the effect of an implicating confession, the extent of the influence is always conjectural, and the circumstantial nature of the evidence connecting the defendant to the conspiracy probably means that prejudice will ensue.[411] Fine speculations as to prejudice should not reduce the rights of a defendant;[412] the federal courts should lay down standards higher than those set by the due process clause;[413] while juries can and will follow many instructions, it is not reasonable to expect a jury to obey instructions to disregard relevant evidence.[414] Administrative expenses should not deter severance, the risk of injustice being too high a price to pay for economy of administration.[415] The rule allowing admission has been clut-

407 Blumenthal v. United States, 332 U.S. 539, 559 (1947). See also the dissenting opinion of Justice Frankfurter concurred in by three justices in Paoli v. United States, 352 U.S. 232, 246 (1957). In Krulewitch v. United States, 336 U.S. 440 (1949), the Court, in following the rule that the declaration is hearsay, seemed to imply that all such declarations were inadmissible as a matter of law against the non-confessing defendant. See Note, 12 N.Y.U. INTRA. L. REV. 106 (1957). But the defendant was being tried alone, and the statements were not those of a co-defendant, but were extraneous statements of a co-conspirator.

408 Lutwak v. United States, 344 U.S. 604, 618-20 (1953). Three Justices dissented.

409 352 U.S. 232, 239, 241-42 (1957). Justices Black, Frankfurter, Douglas and Brennan dissented, the dissent being written by Frankfurter.

410 37 B.U.L. REV. 258 (1957); 43 CORNELL L.Q. 128 (1957); 24 U. CHI. L. REV. 710 (1957); 1957 U. ILL. L.F. 129; VAND. L. REV. 859 (1957); 56 COLUM. L. REV. 1112 (1956); 23 BROOKLYN L. REV. 314 (1956); 2 VILL. L. REV. 131, 133 (1956).

411 56 COLUM. L. REV. 1112, 1114 (1956).

412 37 B.U.L. REV. 258, 262 (1957); 23 BROOKLYN L. REV. 314, 316 (1957); 10 VAND. L. REV. 859, 862 (1957).

413 43 CORNELL L.Q. 128, 134 (1957).

414 24 U. CHI. L. REV. 710, 713 (1957).

415 *Id.* at 714.

tered with a history of dissents and unfavorable commentaries.[416] The Federal Rules on Criminal Procedure should be amended[417] to adopt the proposal of Jerome Frank in his dissenting opinion in the case below:

> When several defendants are on trial for criminal conspiracy, if the government seeks to put in evidence an out-of-court statement by one defendant which is hearsay as to the others (i.e., an out-of-court statement made after the conspiracy has terminated) then (a) unless all references to the other defendants can be effectively depleted (so that the statement will contain no hint of the other's guilt) and unless those references are deleted, (b) the trial judge must (1) refuse to admit the statement or (2) sever the trial of those other defendants.[418]

Another commentator has proposed that upon motion for a separate trial by one of the conspirators the trial judge should hold a pretrial hearing.[419] Here he should determine if the government intends to offer in evidence declarations by one conspirator which cannot be used against the others, and, if so, whether or not its reception would be highly prejudicial. If both questions are answered affirmatively, the judge should order separate trials. If he refuses to grant separate trials, then the highly prejudicial declarations should not be admitted in evidence; if he did, there would be reversible error. In the view of the author of this article these criticisms of the majority decision are persuasive.

A minority of the commentators accepted the decision as correct.[420] It should be presumed, they said, that the jury is capable of and does follow the instructions of the trial judge;[421] law enforcement would be difficult if the confession was left out.[422] The whole record of the case should be scrutinized to see if there is prejudice; the admission furthers the search for truth; if the law is to be changed, it should be by legislation.[423] The majority holding "recognizes the necessity of weighing the interest in admitting the confession as to the declarant in a joint trial against the policy of avoiding prejudice to co-defendants."[424]

The government has sought to avoid the problem by deleting all references to the co-defendant in the confession, and by substituting an X for his name wherever it appears.[425] But such practice may not be desirable;[426] it may not prevent prejudice; it may be dangerous to allow the government to reveal only certain sections of such a statement.[427]

In non-conspiracy cases, also, confessions or admissions may be received

416 1957 U. ILL. L.F. 129, 132.
417 This is proposed in 1957 U. ILL. L.F. 129, 133; and 2 VILL. L. REV. 131, 132 (1956).
418 United States v. Paoli, 229 F.2d 319 324 (2d Cir. 1956).
419 10 VAND. L. REV. 859, 863 (1957).
420 72 HARV. L. REV. 920, 990 (1959); 22 Mo. L. REV. 317 (1957); 33 N.D.L. REV. 317 (1957); 10 SW. L.J. 205 (1956).
421 22 Mo. L. REV. 317, 320 (1957).
422 33 N.D.L. REV. 317, 318 (1957).
423 10 SW. L.J. 205, 207 (1956). But it would seem that Rule 26 of the Federal Rules of Criminal Procedure authorizes the federal courts to bring the rules of evidence up to date.
424 72 HARV. L. REV. 920, 990 (1959).
425 See 37 B.U.L. REV. 258, 261 (1957).
426 Note, 72 HARV. L. REV. 920, 990 (1959); 24 U. CHI. L. REV. 710, 713 (1957).
427 See United States v. Volkell, 251 F.2d 333, 337 (2d Cir. 1958).

from a co-defendant when the jury is instructed that the confession or admission cannot be used against the other. It has been so held as to first degree murder;[428] where the court's instructions to the jury are not a part of the record of the court of appeals, it will be assumed that the jury was correctly instructed.[429] No severance is required where the co-defendant's testimony from the witness stand is substantially to the same effect as his former extra-judicial statement implicating the defendant.[430]

In 1955 a decision of the Court of Appeals for the Fifth Circuit granted a reversal of a denial of severance in a prosecution of two defendants for unlawfully receiving property stolen from the United States.[431] The court pointed out that the circumstances connected the defendants so inseparably that the jury could hardly return a verdict of guilty against one and of not guilty as to the other. Reversible error was also committed in ruling in favor of the admission of the confession on the basis of the government's evidence, while denying the defendant an opportunity to introduce evidence as to its involuntary character. There was an erroneous instruction as to the mental element. It made no difference that there was an instruction to consider the confessions as evidence against the co-defendant alone. The court pointed out that two trials would not be very time-consuming.

In 1959 the Court of Appeals for the Fifth Circuit again reversed on similar reasoning.[432] In a prosecution for violation of the Mann Act, an unsigned statement given by a co-defendant (out of defendant's presence and hearing) to an FBI agent was introduced into evidence. The statement accused the defendant of being the instigator of each detail of the commission of each offense charged. The sole reliance for defendant's protection from the prejudicial effect thereof was the court's instruction to the jury not to treat the statement as evidence against the defendant. Denial of a severance was an abuse of discretion. It made no difference that there was enough evidence to support the defendant's conviction apart from the statement of the co-defendant implicating the defendant. The defendant was deprived of his constitutional right to confront the witnesses against him, as he had no opportunity to cross-examine the defendant.

A district court held that the fact that one defendant made a statement to the authorities in the form of a confession which also implicated his two co-defendants does not entitle the co-defendants to severance and separate trial.[433] It may turn out that the statement will not be offered in evidence. Even if it is offered in evidence, the trial judge may reject it if there was duress in obtaining it. To grant severance would be in effect to decide that the alleged

428 Hall v. United States, 168 F.2d 161, 163 (D.C. Cir. 1948) (admissions).
429 United States v. Harris, 211 F.2d 656, 659 (7th Cir. 1954).
430 Wheeler v. United States, 165 F.2d 225, 228 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 829 (1948).
431 Schaffer v. United States, 221 F.2d 17, 19 (5th Cir. 1955).
432 Barton v. United States, 263 F.2d 894, 898 (5th Cir. 1959). The holding is approved in Falknor, *Evidence*, 35 N.Y.U.L. REV. 348, 349 (1960). See also Belvin v. United States, 273 F.2d 583, 587 (5th Cir. 1960) where, however, one judge dissented. Compare Alvarez v. United States, 275 F.2d 299, 302 (5th Cir. 1960).
433 United States v. Needleman, 6 F.R.D. 205, 206 (E.D.N.Y. 1946). See also Sharp v. United States, 195 F.2d 997, 999 (6th Cir. 1952).

confession was admissable into evidence; pending trial to grant a severance would be premature and unjust to the government. The court did not deny that at the trial a severance might be granted. In one case, four defendants were charged with keeping a gaming table; the fourth defendant was charged also with assault with intent to kill and assault with a dangerous weapon. Evidence was introduced in defense of the assault charges, but none in defense of the gaming charges, and counsel told the trial judge at the beginning of the trial that he would call no witnesses in the gaming case. The trial judge was affirmed in denying a separate trial to the three defendants not charged with assault.[434] In another case, there was no request for severance, despite the fact that counsel for both defendants had read a confession of a defendant and were strictly warned that, short of severance, the trial court's instructions would be the only way to insulate themselves from the effect of the defendant's statements. The trial judge gave a limiting instruction. The court of appeals held that the confession of the co-defendant was properly admitted.[435]

Where the government offered certain testimony concerning a federal agent's conversation with a co-defendant, but the defendant failed to request the trial judge to give an instruction with respect to the scope of the testimony and how it was to be limited only to the co-defendant, the court said the defendant could not complain on appeal of the failure of the trial judge on his own motion to limit the scope of such testimony.[436] In this case the defendant failed to object to admission of the conversations, failed to request that the evidence be limited to his co-defendant, and failed to ask for an instruction on scope. In *Kotteakos v. United States,*[437] the court restricted the trial of numerous conspirators for several conspiracies. This rule has been followed in numerous cases.[438] It has been distinguished in other cases.[439]

In one case the trial court, before the case went to the jury, granted the motion of the defendants for judgment of acquittal on the ground that the trial of 102 defendants in a complicated conspiracy case before a single jury had violated the right to a fair trial.[440] The courts did not even discuss the possibility of trying the defendants separately.[441] As has been pointed out, this raises the question whether, if it were not possible to try numerous defendants

434 Schewe v. United States, 184 F.2d 695, 696 (D.C. Cir. 1950). *Accord,* Dauer v. United States, 189 F.2d 343, 344 (10th Cir. *cert. denied,* 342 U.S. 898 (1951).

435 United States v. Leviton, 193 F.2d 848, 856 (2d Cir. 1951). Judge Jerome Frank dissented.

436 Dauer v. United States, 189 F.2d 343, 344 (10th Cir.), *cert. denied,* 342 U.S. 898 (1951). See also Alvarez v. United States, 275 F.2d 299, 302 (5th Cir. 1960).

437 Kotteakos v. United States, 328 U.S. 750 (1946). See note, 57 COLUM. L. REV. 387, 401 (1957).

438 Brooks v. United States, 164 F.2d 142 (5th Cir. 1947) (convictions reversed).

439 United States v. Schaffer, 266 F.2d 435, 440, 441-42 (2d Cir. 1959); United States v. Samuel Dunkel & Co., 184 F.2d 894, 897 (2d Cir. 1950); Bridgman v. United States, 183 F.2d 750, 753 (9th Cir. 1950); United States v. Lev, 22 F.R.D. 490, 493 (S.D.N.Y. 1958).

440 United States v. Central Supply Ass'n, 6 F.R.D. 526, 533 (N.D. Ohio 1948); Note, 21 TEMP. L.Q. 280 (1948). See also Notes, 68 HARV. L. REV. 1046, 1050 (1955) and 72 HARV. L. REV. 920, 980-81 (1959); 57 COLUM. L. REV. 387, 403 (1957).

441 Judgment of acquittal is an extreme solution as the defendant cannot be prosecuted again. He has been in jeopardy. Orfield, *Motion for Acquittal in Federal Criminal Procedure,* 28 TEMP. L.Q. 400, 409 (1955). It may seem harsh in such a case not to let another defendant who had pleaded nolo contendere withdraw his plea, and plead not guilty.

separately, they could be tried at all without violation of a constitutional right.[442] But it would seem that they could be tried in groups.

In a prosecution for mail fraud, 27 were indicted, but only nine were brought to trial, and two were convicted. Eighteen overt acts were specified in separate courts. A court of appeals upheld the convictions,[443] noting that a single over-all plan of defendants was involved, justifying mass trial. In a conspiracy prosecution against 46 defendants, severance was denied at the pretrial stage without prejudice to a renewal of the motion for severance at the trial.[444] At the later stage the court will consider a number of factors: Can there be an adequate rapport between the defendants and their counsel? Can the jury recognize each of the defendants and learn their names from the beginning of the trial? Will the requirements of a fair trial be frustrated by the sheer weight of the number of defendants in the sense that only a prodigious memory and a lively intelligence on the part of each jurror can fit each segment of relevant evidence into its proper place? On the other hand, severance may prejudice the government in having to reveal its case in the first trial for the benefit of those tried later. The defendants are also placed in an unequal position, as some gain the advantage of disclosure of the government's case and the possibility of the death of witnesses or the fading memories of witnesses. Later in this case 18 defendants were tried together and this was upheld on appeal.[445] Severance was denied where an indictment charged 23 defendants with conspiracy to defraud the United States to obstruct justice and to commit perjury.[446] The agreement was on a single level for a single end; the same evidence would be involved. A separate trial would have taken seven weeks. Severance was denied where 17 defendants were prosecuted for conspiracy to violate the narcotics laws.[447]

4. *Motion for mistrial.*

When two of seven defendants on trial had engaged in a violent alteration with the United States marshal, and another defendant had been forcibly restrained from swallowing certain capsules, such occurrences were prejudicial to the other defendants, and they were therefore entitled to a mistrial.[448] Prejudicial comments of the trial judge also gave the other defendants a right to a mistrial, even though counsel for the defendants did not object. Motion for mistrial has been made because of introduction in evidence of a confession by a co-defendant implicating the defendant.[449] The trial court need not declare a mistrial on its own motion merely because the interests of the defendants were

442 Note, 68 HARV. L. REV. 1046, 1050 n. 37 (1955).
443 Bridgman v. United States, 183 F.2d 750, 753 (9th Cir. 1950). The court found that Kotteakos v. United States, 328 U.S. 750 (1946), did not apply to the factual situation presented.
444 United States v. Stromberg, 22 F.R.D. 513, 524 (S.D.N.Y. 1957). Likewise in a case involving only eight defendants the trial court denied a pretrial motion for severance. United States v. Lev, 22 F.R.D. 490, 491 (S.D.N.Y. 1958).
445 United States v. Stromberg, 268 F.2d 256, 260, 264 (2d Cir. 1959).
446 United States v. Bonanno, 177 F. Supp. 106, 116 (S.D.N.Y. 1959). There were also 36 co-conspirators.
447 United States v. Aviles, 274 F.2d 179, 194 (2d Cir. 1960).
448 Braswell v. United States, 200 F.2d 597, 600 (5th Cir. 1952).
449 Belvin v. United States, 273 F.2d 583, 587 (5th Cir. 1960).

hostile.[450] The *defendant* should move for mistrial if there is really a case for it. A mistrial need not be granted because of a tirade by one defendant that all the defendants had criminal records and because the counsel for one defendant asserted that his defendant had no criminal record.[451] Instructions of the trial judge to disregard would cure.

5. *Time of attack on joinder*

A motion by the defendant for severance and separate trial should not be made before the case is at issue;[452] on the filing of a plea of not guilty the case would be at issue. On a pretrial motion severance will not be granted on the ground that the confession of a co-defendant might be introduced at the trial.[453] Such a motion could be renewed at the trial, but prior to trial the court is without adequate information on which to rule; counsel are just beginning to familiarize themselves with the law and the facts.[454] Severance should not be applied without knowledge of the consequences; otherwise it becomes a bludgeon which may prejudice the defendants and the government.

6. *Motion in arrest of judgment*

When defendants are joined who did not participate in the offense move for severance which is denied, they may later move in arrest of judgment,[455] and for new trial.

7. *Motion for new trial*

Improper joinder of defendants should be objected to before or during trial, or on a motion for new trial. If there is no such objection, the defendant cannot raise the issue for the first time on appeal.[456]

8. *Appeal*

If the defendants are advised of the possible conflict of interest between them at the trial and they nevertheless proceed with common counsel without any motion to sever, the appellate court will not find reversible error when the facts do not indicate antagonism.[457] If the defendant made no objection to a joint trial, or shows no reason why a motion for severance, if made, should have been granted, the appellate court will not reverse.[458] The appellate court will reverse a denial of severance of defendants only if the trial judge abused

450 Goodman v. United States, 273 F. 2d 853, 860 (8th Cir. 1960).
451 United States v. Aviles, 274 F.2d 179, 193 (2d Cir. 1960). *Accord,* Reistroffer v. United States, 258 F.2d 379, 392-93 (8th Cir. 1958), *cert. denied,* 358 U.S. 927 (1959).
452 United States v. Fujimoto, 102 F. Supp. 890, 898 (D. Hawaii 1952). Prosecution was for conspiracy to violate the Smith Act.
453 United States v. Dioguardi, 20 F.R.D. 10, 15 (S.D.N.Y. 1956).
454 United States v. Stromberg, 22 F.R.D. 513, 526 (S.D.N.Y. 1957).
455 Ingram v. United States, 272 F.2d 567, 568, 571 (4th Cir. 1959).
456 Lelles v. United States, 241 F.2d 21, 23 n. 2 (9th Cir. 1957). A motion for new trial was denied where a defendant and another were indicted for conspiracy and the defendant had several opportunities to raise the question of severance for trial, but failed to do so. United States v. Koritan, 182 F. Supp. 143, 145 (E.D. Pa. 1960).
457 United States v. Echeles, 222 F.2d 144, 151 (7th Cir. 1955).
458 Siglar v. United States, 208 F.2d 865, 867 (5th Cir. 1954). In Johns v. United States, 227 F.2d 374, 375 (10th Cir. 1955), though no motion to sever was made, the appellate court reviewed, and pointed out that severance was discretionary.

his discretion;[459] there have been but few reversals for denial of severance.[460]

Suppose there is a good faith joinder of defendants for conspiracy and also joinder of defendants for substantive offenses; suppose also that the latter joinder was improper; and that the conspiracy count is dismissed at the close of the evidence, but there is a conviction on a substantive count. In such a case a court of appeals refused to reverse.[461] It would seem, however, that on seasonable application to the trial court that court might well have severed as to the substantive offense, as there was no common participation of defendants as provided in Rule 8(b).[462]

9. *Motion to vacate*

A defendant who commits a crime jointly with others may be jointly or severally prosecuted in the discretion of the United States Attorney.[463] He cannot complain on motion to vacate, under 62 Stat. 967, 28 U. S. C. § 2255 (1958), that he was separately prosecuted. Joinder of offenses and of defendants is not a basis for a motion to vacate under this statute, particularly where no motion is made for a severance of defendants, or to require the government to elect between counts.[464] The court reviewed the joinder, however, and found it proper.

10. *Severance and jeopardy*

Suppose a severance is obtained during the trial of several defendants. Has the severed defendant been in jeopardy? A federal district court has held not.[465] The severance was obtained so that the defendant could undergo immediate surgery; the government consented to the motion; the court could have declared a mistrial and discharged the jury. The fact that there was a severance instead of a mistrial did not increase the rights of the defendant. It was the *defendant* who moved for the severance.

D. *Improper Consolidation*

1. *Resisting motion to consolidate*

Upon a motion of the government to consolidate indictments the defendant may resist the motion.[466] The trial court will refuse consolidation where the

459 Kansas City Star Co. v. United States, 240 F.2d 643, 651 (8th Cir. 1957); United States v. H.J.K. Theatre Corporation, 236 F.2d 502, 506 (2d Cir. 1956); Duke v. United States, 233 F.2d 897, 900 (5th Cir. 1956); United States v. Harris, 211 F.2d 656, 659 (7th Cir. 1954).

460 Reversal occurred in Barton v. United States, 263 F.2d 894, 898 (5th Cir. 1959); Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955).

461 United States v. Schaffer, 266 F.2d 435, 440 (2d Cir. 1959), *aff'd,* Schaffer v. United States, 362 U.S. 511 (1960) (five to four).

462 See Ingram v. United States, 272 F.2d 567, 568 (4th Cir. 1959) where the court reversed a denial of severance. *But see* 74 HARV. L. REV. 81, 158-60 (1960).

463 United States v. Mimee, 89 F. Supp. 148, 150 (E.D. Mich. 1950). The defendant pleaded guilty.

464 United States v. Bernett, 140 F. Supp. 373, 374 (D. Md. 1955).

465 United States v. Stein, 140 F. Supp. 761, 763 (S.D.N.Y. 1956). If a mistrial is ordered at the request of the defendant or with his consent, he may later be tried separately for the same offense. People v. Mills, 148 Cal. App.2d 392, 306 P.2d 1005, 1007 (1957). See Note, 72 HARV. L. REV. 920, 982 (1959).

466 Dunaway v. United States, 205 F.2d 23, 24 (D.C. Cir. 1953). The motion to consolidate was made when the cases were called for trial. See also Mejia v. United States, 253 F.2d 560 (9th Cir. 1958).

basic evidence must necessarily differ in proving each of the individual indictments.[467] Reasonable doubt as to the propriety of consolidation will be resolved in favor of the defendants; it is not necessarily the duty of defendant's counsel to resist consolidation.[468]

2. *Motion to dismiss*

Relief from improper consolidation is not by motion to dismiss, but by motion to sever under Rule 14.[469]

3. *Motion to sever*

Severance as to consolidated indictments is in the sound discretion of the trial judge.[470] A defendant is not entitled to severance merely because a co-defendant confessed.[471] The instruction of the trial judge that the confession of the co-defendant cannot be considered against the defendant prevents prejudice to the defendant. Where several defendants are involved, they are not entitled to severance and separate trials if they might have been joined in one indictment under Rule 8(b).[472] Instructions to the jury as to the evidence will protect the various defendants. A defendant may not have a severance where first there was a single indictment against two defendants, then a supervening indictment as to one defendant to correct his name, and then consolidation of the two indictments.[473]

Defendants cannot complain of mistrial in violation of *Kotteakos*,[474] where two corporate defendants and five individual defendants were charged in two indictments with conspiracy and the indictments were consolidated.[475] Defendants claimed that seven conspiracies were charged, one in one indictment and six in the other; but the court found that each indictment charged only one conspiracy. It should be noted that in 1954 in a civil case involving consolidated condemnation proceedings the court of appeals reversed on the ground that the volume of the trial violated the parties' rights to due process.[476] It was the first case to take that position.[477]

4. *Cure by verdict*

Acquittal of one of several consolidated indictments disposes *pro tanto* of the claim of prejudice, though not *in toto*.[478]

467 United States v. Foster, 80 F. Supp. 479, 488 (S.D.N.Y. 1948).
468 Willis v. United States, 271 F.2d 477, 479 (D.C. Cir. 1959). *But see* the dissenting opinion of Bazelon, J.
469 United States v. Manno, 118 F. Supp. 511, 514 (N.D. Ill. 1954). In one case the defendant moved to sever and to compel election. United States v. Martell, 104 F. Supp. 140, 142 (E.D. Pa. 1952).
470 Williams v. United States, 265 F.2d 214, 215 (9th Cir. 1959).
471 United States v. Howell, 249 F.2d 140, 156 (3d Cir. 1956); Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948).
472 Malatkofski v. United States, 179 F.2d 905, 909 (1st Cir. 1950).
473 United States v. Howell, 249 F.2d 140, 156 (3d Cir. 1956).
474 238 U.S. 750 (1946).
475 United States v. Samuel Dunkel & Co., 184 F.2d 894, 897 (2d Cir. 1950).
476 Gwathmey v. United States, 215 F.2d 148 (5th Cir. 1954).
477 See note, 68 HARV. L. REV. 1046, 1049 (1955).
478 Peckham v. United States, 210 F.2d 693, 697 (D.C. Cir. 1953); Dunaway v. United States, 205 F.2d 23, 26 (D.C. Cir. 1953).

5. *Time of attack on consolidation*

A motion for severance made before any application by the government to consolidate is premature.[479] In one case the motion to sever and to compel election was made before the jury was sworn.[480]

6. *Continuance*

Where an indictment against one defendant is consolidated with one against another defendant, the defendant is not necessarily entitled to a continuance because of such consolidation.[481]

7. *Motion for new trial*

Where consolidation is by agreement with the defendant, he cannot later object, as by motion for new trial.[482] This is particularly true where nothing appears to indicate that the defendant was in any way misled into making the request or that he was prejudiced by the consolidation.[483]

8. *Appeal*

Where the defendant fails to object to consolidation under Rule 14, he waives the objection on appeal;[484] but the appellate courts seem usually to consider the issue and find consolidation proper.[485] Where the defendant's counsel affirmatively expressed satisfaction with consolidation for trial of three indictments charging violations of the narcotics laws, the trial court acted properly in permitting consolidation in the absence of any objection at the outset of the trial.[486]

In one case, a defendant was convicted under two counts of two consolidated indictments charging embezzlement, and two counts charging obtaining money by false pretenses. The sentences on false pretenses were each less than the sentence imposed on the embezzlement counts and were concurrent therewith; the convictions on the embezzlement counts were sustained. The defendant's contentions regarding the convictions on the false pretenses counts were not examined by the court of appeals.[487]

The question of consolidation is one for the trial court, and its decision will be reversed only for abuse of discretion.[488] Even though the trial court

479 United States v. Klock, 100 F. Supp. 230, 235 (N.D.N.Y. 1951).
480 United States v. Martell, 104 F. Supp. 140, 142 (E.D. Pa. 1952).
481 Gaudio v. United States, 179 F.2d 300 (4th Cir. 1950).
482 United States v. Nystrom, 116 F. Supp. 771, 776 (W.D. Pa. 1953), *aff'd,* 237 F.2d 218, 225 (3d Cir. 1956).
483 Smith v. United States, 234 F. 2d 385, 389 (5th Cir. 1956). One judge dissented.
484 Daley v. United States, 231 F.2d 123, 126 (1st Cir.), *cert. denied,* 351 U.S. 964 (1956).
485 Williams v. United States, 265 F.2d 214, 215 (9th Cir. 1959); Grant v. United States, 254 F.2d 337 (D.C. Cir. 1958).
486 Willis v. United States, 271 F.2d 477, 479 (D.C. 1959). One judge dissented.
487 Gibson v. United States, 268 F.2d 586, 589 (D.C. Cir. 1959).
488 Johnston v. United States, 260 F.2d 345, 346 (10th Cir. 1958); Kansas City Star Co. v. United States, 240 F.2d 643, 652 (8th Cir. 1957); Turner v. United States, 222 F.2d 926, 932 (4th Cir.), *cert. denied,* 350 U.S. 831 (1955); United States v. Lebron, 222 F.2d 531, 535 (2d Cir. 1955); United States v. Harris, 211 F.2d 656, 659 (7th Cir.), *cert. denied,* 348 U.S. 803 (1954); Gaudio v. United States, 179 F.2d 300, 301 (4th Cir. 1950); United States v. Rosenblum, 176 F.2d 321, 324 (7th Cir. 1949); Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948); United States v. Antonelli Fireworks Co., 155 F.2d 631, 635 (2d Cir. 1946); United States v. Foster, 80 F. Supp. 479, 488 (S.D.N.Y. 1948).

would have been justified in refusing to consolidate, it does not necessarily follow that the appellate court will reverse.[489] But there is no discretion to consolidate where multiple defendants are charged with offenses in no way connected together.[490] The harmless error rule, Rule 52(a), would not apply in such case.

9. *Motion to vacate*

Possibly to some extent improper consolidation may be reviewed on a motion to vacate under 62 Stat. 967, 28 U.S.C. § 2255 (1958).[491]

E. *Severance for transfer*

What about transfer under Rule 21 of part of the counts set out in the indictment of information? In a case arising under Rule 21(b) on transfer of crimes committed in more than one district, transfer was denied because, while conspiracy was committed in the transferee district, the substantive offense was not.[492] The court pointed out that Rule 21 made no express provision for transfer of one of the separate counts stated in the indictment. A district court in Maine took a similar view;[493] on appeal the court of appeals left the question open.[494] The rule against transfer of part of the offenses makes it easy for the government to prevent transfer by setting out an offense committed only in the transferor district. This is true as to prosecutions under Rule 21(b), but it should not be true as to prosecutions under Rule 21(a), as there the offense need not have been committed in the transferee district. Perhaps Rule 21, should be amended to allow transfer of part of the offenses.[495]

But where the issue is severance of defendants rather than of offenses, there seems to be more leeway for severance. A district court ordered a transfer from Maryland to Illinois even though two defendants opposed a transfer.[496] The court ordered a severance of parties so as to transfer those defendants seeking a transfer; the defendants objecting to transfer were not transferred.[497]

489 Dunaway v. United States, 205 F.2d 23, 25 (D.C. Cir. 1953). One judge dissented.

490 Ingram v. United States, 272 F.2d 567, 569, 570 (4th Cir. 1959). Compare Griffin v. United States, 272 F.2d 801 (5th Cir. 1959).

491 Etherton v. United States, 249 F.2d 410, 412 (9th Cir. 1957), *cert. denied,* 355 U.S. 919 (1958). Nevertheless the appellate court seems to have reviewed the issue to some extent, and affirmed the convictions. Violations of the law of the Territory of Alaska were involved. See also Application of Dinerstein, 258 F.2d 609 (9th Cir. 1958), where the court did review the judgments given after trial together.

492 United States v. Hughes Tool Co., 78 F. Supp. 409, 410 (D. Hawaii 1948). *Accord,* United States v. Kimball Securities, Inc. 25 F.R.D. 172 (S.D.N.Y. 1960). But in United States v. Tellier, 19 F.R.D. 164, 168 (E.D.N.Y. 1956) where the court denied transfer on the particular facts, it did not deny that in some cases there could be transfer of part of the counts. In United States v. Choate, 276 F.2d 724, 726 (5th Cir. 1960), it was held that there could be a partial transfer and the court of appeals denied mandamus against such transfer. See Orfield, *Transfer of Federal Offenses Committed in More Than One District or Division,* 51 MICH. L. REV. 31, 40 (1952).

493 United States v. Holdsworth, 9 F.R.D. 198, 202 (D. Me. 1949).

494 Holdsworth v. United States, 179 F.2d 933, 935 (1st Cir. 1950).

495 72 HARV. L. REV. 920, 977 (1959).

496 United States v. Erie Basin Metal Products Co., 79 F. Supp. 880, 882 (D. Md. 1948). Transfer was denied in United States v. Tellier, 19 F.R.D. 164, 167 (E.D.N.Y. 1956), on the particular facts, and in United States v. Kimball Securities, Inc., 25 F.R.D. 172 (S.D.N.Y. 1960), on the particular facts. In United States v. Choate, 276 F.2d 724, 727 (5th Cir. 1960), five out of seven defendants were permitted to transfer.

497 An English writer has concluded that the transferor court should have power to transfer not only those defendants who wish transfer, but all defendants in cases where all shall

It made no difference that there might be duplication of testimony; the court permitted severance of parties for transfer, but not severance of offenses. The court stated: "Also, these four moving defendants do not contend, and we conclude that they may not successfully contend, that there may be a transfer of less than the entire proceedings as to them. That is to say, we conclude there may not be a transfer of one or more, and not of all counts in the indictment as respects them."[498] But the court gave no reasons for such distinction. If the defendants may be severed, why not the offenses?[499] The court pointed out that there could be severance of parties as to a case not transferred, but it failed to note that there can also be severance of offenses as to a case not transferred.

F. *Right to counsel*

The defendant may be his own attorney at the trial of consolidated informations.[500] If so, he is likely to omit to take important steps to protect his interests.[501]

While a defendant has the right to defend himself or to be represented by counsel, he has no right to a hybrid of the two rights.[502] A defendant who was an attorney accepted counsel of his own choosing, subject to his personal participation only as permitted by the trial court, which, at the time the defendant agreed to accept such counsel, indicated that the defendant should not both testify and attempt to argue to the jury. It was held that he had made a binding election waiving his right to defend himself personally, so that the trial court's denial of his request to make the opening argument personally deprived him of no constitutional right.

A defendant is not denied the right to counsel where he was assigned counsel six weeks before commencement of trial for conspiracy.[503] He must show prejudice from such denial. The court pointed out that he had had the benefit of all motions made by the other counsel before trial. Where each defendant has separate counsel, this tends to show adequate representation and a fair trial.[504] Assistance of counsel may be inadequate if so many defendants are

be tried together. Brunyate, *The American Draft Code of Criminal Procedure: 1930,* 49 L.Q. REV. 192, 201 (1923).

498 United States v. Erie Basin Metal Products Co., 79 F. Supp. 880 at 882. A single case has construed Rule 20 as not permitting a transfer for plea of guilty and sentence when several defendants are involved. United States v. Bishop, 76 F. Supp. 866, 870 (D. Ore. 1948).

499 Orfield, *Transfer of Federal Offenses Committed in More Than One District or Division,* 51 MICH. L. REV. 31, 50 (1952); Orfield, *Transfer of Federal Offenses for Prejudice in the District or Divsion,* 27 TEMP. L. Q. 21, 38-41 (1953).

500 Smith v. United States, 234 F.2d 385, 387 (5th Cir. 1956). See 62 Stat. 944 (1948), 28 U.S.C. § 1654 (1958).

501 *Id.* at 388.

502 Duke v. United States, 255 F.2d 721, 724 (9th Cir.), *cert. denied,* 357 U.S. 920 (1958).

503 United States v. Aviles, 274 F.2d 179, 193 (2d Cir. 1960).

504 United States v. Schaffer, 266 F.2d 435, 441 (2d Cir. 1959), *aff'd,* Schaffer v. United States, 362 U.S. 511 (1960). A defendant was not deprived of effective assistance of counsel because during the trial his counsel entered an appearance also for two other defendants who were charged with the same robbery and also were charged with another robbery committed the day before, where no conflict of interests appeared and the added representation was assumed by counsel as a calculated move on his part to aid the defendant in his defense. Wynn v. United States, 275 F.2d 648 (D.C. Cir. 1960). No inadequacy of representation was found where four defendants tried for assault with a dangerous weapon

tried together that there cannot be adequate rapport between the defendants and their counsel.[505]

Failure of counsel for a defendant to object to consolidation for trial of three indictments charging violation of the narcotics laws and to request instructions to consider the indictments and evidence separately does not constitute ineffective assistance of counsel.[506]

Counsel representing several defendants jointly tried, sometimes improperly try to prevent one defendant from testifying in order to protect the other defendant, even though the one testifying is also testifying in his own interest.[507] The error has been held cured by having the defendant called by the government as a rebuttal witness, as defendant's counsel was unwilling to call him.

There is no right to counsel on an appeal from a motion to vacate judgments of conviction of consolidated offenses when the court of appeals in ruling on the application could determine that the appeal was not taken in good faith.[508] The court did not deny, or hold, that counsel could be demanded in cases where appointed counsel is essential to permit the court of appeals to determine whether the appeal was taken in good faith.

IV. MODERN REFORM PROPOSALS

Under section 185 of the American Law Institute Code of Criminal Procedure, if there is duplicity, misjoinder of offenses or misjoinder of defendants, the trial judge "may order the prosecuting attorney to sever such indictment or information into separate indictments or informations, or into separate counts, as shall be proper." The section seems narrow as the concept of misjoinder is not as broad as that of prejudicial joinder.[509] Section 312 deals more clearly with prejudicial joinder of defendants. It provides:

> When two or more defendants are jointly charged with any offense, whether felony or misdemeanor, they shall be tried jointly, unless the court in its discretion on the motion of the prosecuting attorney or any defendant order separate trials. In ordering separate trials, the court may order that one or more defendants be each separately tried and the others jointly tried, or may order that several defendants be jointly tried in one trial and the others jointly tried in another trial or trials, or may order that each defendant be separately tried.

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were represented by four court appointed attorneys for the group and no conflict of interest appeared. Lebron v. United States, 229 F.2d 16, 20 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 974 (1956).

505 Central States v. Stromberg, 22 F.R.D. 513, 525 (S.D.N.Y. 1957).

506 Willis v. United States, 271 F.2d 477, 479 (D.C. Cir. 1959). One judge dissented.

507 United States v. Haynes, 81 F. Supp. 63, 69 (W.D. Pa. 1948). Compare State v. Martineau, 101 N.W.2d 410 (Minn. 1960), noted in 51 J. CRIM. L., C.P.S. 240 (1960), and 45 MINN. L. REV. 187 (1960).

508 Application of Dinerstein, 258 F.2d 609, 611 (9th Cir. 1958). See Note, 26 U. CHI. L. REV. 454, 455, 465 (1959).

509 ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 316 (1947). To be contrasted with rules for relief for prejudice of joinder is the modern proposal for compulsory joinder of offenses with the penalty of a bar to subsequent prosecutions, proposed in the Model Penal Code of the American Law Institute. See Note, 11 STAN. L. REV. 735, 753-59 (1959).

The section does not permit severance on the motion of the court, as does Federal Rule 14.

The English Indictments Act of 1915 provides:

> Where, before trial, or at any stage of the trial, the Court is of the opinion that a person accused may be prejudiced or embarrassed in his defense by reason of being charged with more than one offense in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offenses charged in an indictment, the court may order a separate trial of any count or counts of such indictment.[510]

The Court of Criminal Appeal will not interfere with the discretion unless justice has not been done.[511] The court has pointed out that it is very undesirable that a large number of counts appear in one indictment.[512] Using several indictments may increase the costs to some small amount, but this is nothing against the possible danger of an unfair trial. The prosecutor should be put to his election. Misjoinder of defendants may be made the subject of demurrer or motion in arrest of judgment or appeal.[513] The court may quash the indictment. It may order separate trials. Where there is a joint trial it is the duty of the court to warn the jury that the statement of one defendant not made on oath is not evidence against the other defendant; but the prosecution is not under any duty to put in evidence selected passages only and may put in the whole statement.[514] Separate trials are sometimes granted where the evidence admissible against one defendant would not be admissible against the other defendants, or where separate trial would enable the defendant to call for the defense persons jointly indicted with him, or the prosecution to call an accomplice, or where persons jointly indicted for felony refuse to join in their challenges.[515] Consolidation of indictments is not permitted even with the consent of the parties and a trial of consolidated indictments is a nullity.[516] Duplicity is usually attacked by motion to quash before the defendant pleads.[517] Demurrer may be used, but is seldom employed. Motion in arrest of judgment does not lie. But it is ground of appeal under the Criminal Appeal Act.

Rule 31 entitled "Prejudicial Joinder" of the Uniform Rules of Criminal Procedure adopted in 1952 is like Federal Rule 14 in its first sentence. But it adds a second sentence not appearing in Rule 14: "A motion for action under this Rule may be made only before the jury is sworn, or, where trial by jury is waived, before any evidence is received." The Second Preliminary Draft (eighth Committee draft) of the Federal Rules of Criminal Procedure had contained such a provision as to severance of co-defendants, but not of

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510 5 & 6 Geo. V. c. 90 sec. 5 (3).
511 R. v. Sims, [1946] K.B. 531; 1 ALL E. R. 697. See: KENNY, OUTLINES OF CRIMINAL LAW 556 (1958); ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 53-56 (1949).
512 Practice Note (Indictment [1952] 1 T.L.R. 1390, 36 Crim. App. R. 94.
513 ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 51-53 (1949).
514 R. v. Gunewardene, [1951] 2 T.L.R. 315, 35 Crim. App. R. 80.
515 ARCHBOLD, *supra* note 513 at 53.
516 ARCHBOLD, *supra* note 513 at 184.
517 ARCHBOLD, *supra* note 513 at 49.

counts.[518] But the provision was deleted in the Report of the Advisory Committee and the Supreme Court accepted the deletion. The drafters of Rule 31 apparently thought that severance after the trial had commenced might prevent trial of the defendant severed on grounds of double jeopardy.[519] The question of double jeopardy has come up in only one case construing Federal Rule 14 and that case found no jeopardy.[520] Furthermore increasingly the federal cases involve severance during the trial. To require severance before trial could greatly limit the utility of severance.

518 ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 319 (1947).

519 The comment to Rule 31 cited Berge, *Proposed Federal Rules of Criminal Procedure*, 42 MICH. L. REV. 353, 364 (1943). Mr. Berge stated: "This rule suggests the question whether severance after trial has started would prevent retrial of the defendant severed on grounds of double jeopardy."

520 United States v. Stein, 140 F. Supp. 761, 764 (S.D.N.Y. 1956). See Note, 72 HARV. L. REV. 920, 982 (1959).